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IN THE

Supreme Court of the United States

No. 71-249

THOMAS JUSTIN ORR, *Petitioner*,

v.

RAYMOND E. TRINTER, THE COLUMBUS PUBLIC SCHOOLS, THE BOARD OF EDUCATION OF THE COLUMBUS PUBLIC SCHOOLS, HAROLD H. EIBLING, C. L. DUMAREE, I. F. YOUNG, DONALD E. CALHOUN, PAUL R. LANGDON, MRS. BARBARA S. LEVENSON, THOMAS J. MOYER, MRS. VIRGINIA E. PRENTICE, ROBERT A. RAMSEY, WALTON H. WALKER, HOWARD C. KUHNLE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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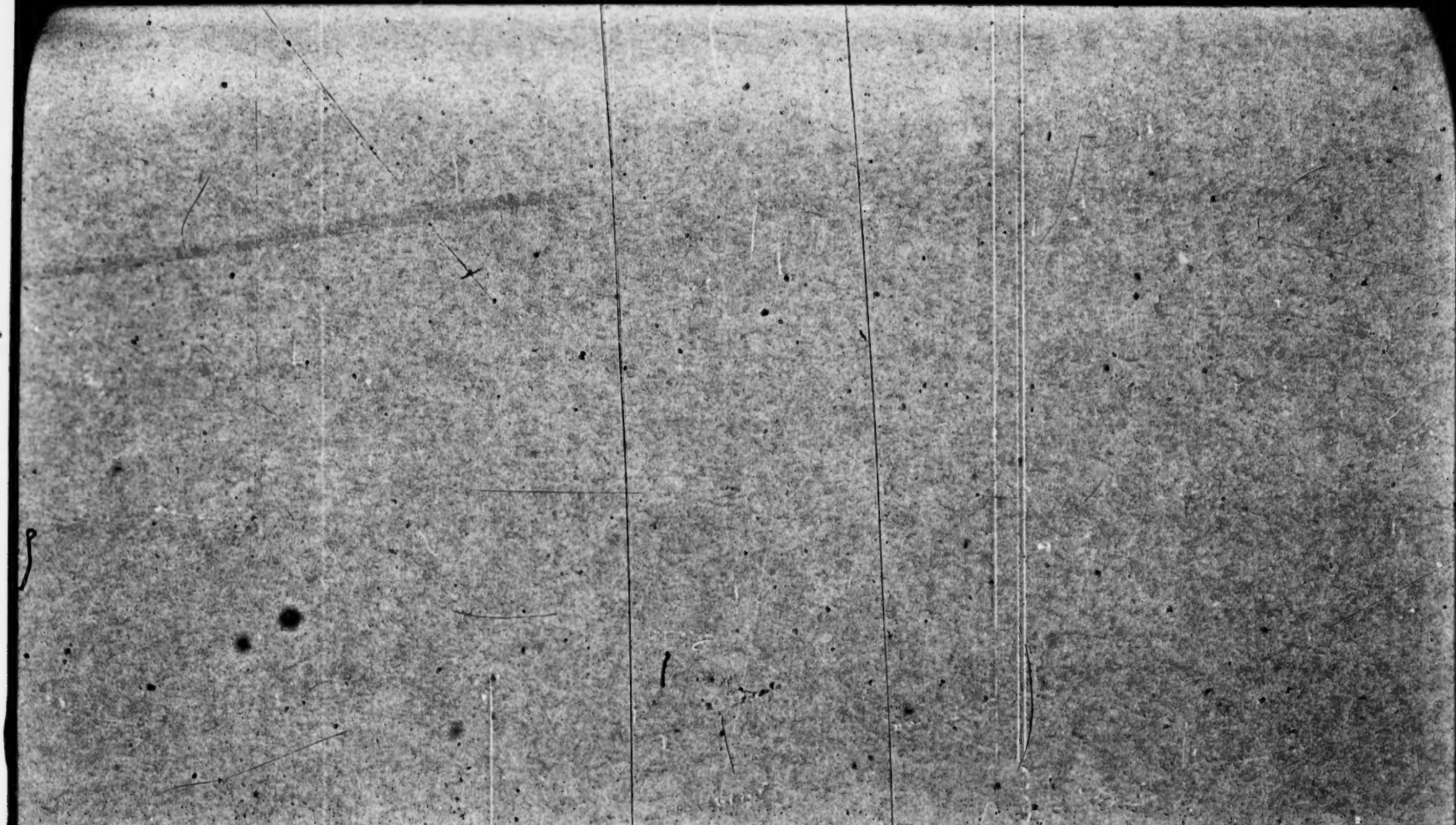

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 16, 1971.

OPINIONS BELOW

The opinion of the district court appears at 318 F. Supp. 1041 and is reproduced in the Appendix to this petition at *App.* 30-38. The opinion of the Court of Appeals is reported at ... F.2d ..., and is reproduced in the Appendix to this petition at *App.* 18-29.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1971. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, consistent with the due process clause of the Fourteenth Amendment of the United States Constitution, a public educational institution's refusal to renew a non-tenured teacher's employment for another school year—resulting not only in the teacher's loss of that employment but also in impairment of his professional reputation and opportunity to pursue his teaching profession elsewhere—may be accomplished without providing the teacher a statement of the reasons for non-renewal and a hearing thereon.

STATEMENT OF THE CASE

Petitioner, Thomas Justin Orr (hereinafter "Orr") is a school-teacher by profession (Stip. 2).[1] He received a Bachelor of Arts degree from Greenville College, Illinois, and a Master of Arts degree from Ohio State University, and is certified by the Ohio Department of Education as qualified to teach the subjects of English, History and Government in Grades 7 through 12 anywhere in the State of Ohio. (*Ibid*).[2]

On May 23, 1969, Orr was hired by respondent Board of Education of the Columbus Public Schools (hereinafter "Board of Education") to teach during the school year 1969-1970 pursuant to a "limited contract" (Stip. 6)—the type of contract which Ohio law prescribes for all teachers during their first years in a school district.[3]. Under Ohio law, a teacher holding a "limited contract" during a school year is automatically "deemed reemployed" for the following

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[1] There was no printed appendix in the court below, but the entire district court record was before the court. As used herein, "Stip." refers to the stipulation of facts entered by the parties in the district court.

[2] Orr holds a "provisional certificate", the type issued to all teachers when they first qualify for certification. Such certificates may in later years be converted into "professional" and "permanent" certificates. Ohio Revised Code, Sections 3319.24, 3319.25, 3319.26.

[3] Ohio Revised Code, Section 3319.11.

school year unless he receives written notice from the Board of Education "of its intention not to re-employ him on or before the 30th day of April." [4] Ohio law does not require that a "limited contract" teacher be told the reasons for non-renewal, nor that he be afforded a hearing.[5]

In practice the Columbus School System does not deny re-employment to a teacher without first giving him an opportunity to resign, "which, if the teacher chooses that alternative, ends the matter" (Stip. 1, 2). This option is afforded the teacher so that "his record would not show Board action" (Stip. 4).

During the 1969-70 school year, Orr taught tenth grade English and History at Walnut Ridge High School in Columbus. On April 10, 1970, he was told by respondent Trinter, the principal of his school, that his employment would not be renewed for the following school year. Trinter advised Orr of his option to resign (Stip. 4). Three days later, Orr met with respondent Young, the assistant superintendent in charge of personnel for the Columbus Public Schools. Young would not tell him the reasons for the refusal to renew (Stip. 3, 4).

Orr did not resign, and on April 28, 1970, the Board of Education formally notified him that his employment would not be renewed. The notice did not indicate the reasons for

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[4] Ohio Revised Code, Section 3319.11.

[5] By contrast, a tenured teacher may be denied re-employment only "for gross inefficiency or immorality; for willfull and persistent violations of reasonable regulations of the board of education; or for other good and just cause," and only pursuant to an elaborate procedural scheme. He must be provided "a written notice . . . with full specification of the grounds" for which termination is contemplated. Upon request, he is entitled to a prompt hearing "confined to the grounds given for such termination." The hearing must be transcribed, with a copy of the transcript furnished to him. He is entitled to be present at the hearing, to be represented by counsel, to subpoena witnesses, to require that their testimony be under oath, and to cross-examine them. If the ultimate decision is adverse, he has a right of appeal to the Court of Common Pleas. Ohio Revised Code, Section 3319.16.

non-renewal. A formal record of the Board's action was entered in its minutes (Stip. 5).

Thereafter, Orr twice requested in writing that he be told the reasons for his non-renewal (Stip. 5). These requests went unanswered (Stip. 5; *App.* 31).[6] At no time was Orr afforded a hearing with respect to his non-renewal (Stip. 5).

Upon completion of his teaching duties for the school year 1969-70, Orr applied for a teaching position in Mansfield, Ohio. Although the hiring officials told Orr that they thought him otherwise qualified, they "felt required not to hire [him] in light of the situation in Columbus, Ohio." Orr's other efforts to obtain teaching positions were similarly frustrated. The Ohio State University College of Education maintains a Placement Service, but Orr was not able to utilize it. The regulations of the Placement Service require that the applicant furnish "a reference from a superior" regarding all prior teaching experience. Representatives of the Columbus Public Schools declined to submit recommendations or to be used as a reference for Orr, because he had been "terminated by action of the School Board." Orr ultimately was unable to secure a teaching position for the following year. He made several efforts to obtain employment in fields other than teaching, but the general business downturn made his quest unsuccessful. On numerous occasions he was told that he was over-qualified for the non-teaching jobs he was seeking, and that this was a "liability" in his efforts to obtain such employment.[7]

On June 5, 1970, Orr initiated the instant action pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, in the United States District Court for the Southern District of

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[6] "*App.*" refers to the decisions of the lower courts herein, reprinted in the Appendix to this petition.

[7] Affidavit of Thomas Justin Orr, dated October 22, 1970, attached to Motion for Advancement of Hearing in the court below.

Ohio. The complaint alleged, *inter alia,* that defendants[8] had violated Orr's constitutional right to procedural due process by denying him re-employment without furnishing him a statement of the reasons therefor and a hearing. The complaint alleged that Orr "will continue throughout the remainder of his professional career to suffer the [stigma] of having his professional qualifications [impugned] by the present action of the Defendants in refusing to renew his contract for unknown reasons, and will have his prospects of acquiring future teaching positions at other schools substantially impaired by the aforementioned actions of the Defendants."[9]

The parties stipulated the relevant facts, and on August 3, 1970, Judge Kinneary issued his opinion and order. While agreeing with Defendants' claim that "government employment is not a property right, but a privilege" (*App.* 31-32), Judge Kinneary stated that that "does not end the Court's inquiry." Rather, citing this Court's decision in *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895 (1960), he concluded:

> "The Court must balance the precise nature of the governmental function involved against the private interest affected by the termination of employment to determine whether notice and hearing are required." (*App.* 32).

Judge Kinneary recognized the Board of Education's right to great flexibility in deciding whether a non-tenured teacher should be retained in the school system. That flexibility, he

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[8] The defendants were the Columbus Public Schools, the Board of Education, the Superintendent of Schools (Eibling), Orr's principal (Trinter), the Assistant Superintendents for Administration (Dumaree) and Personnel (Young), the members of the Board of Education (Calhoun, Langdon, Levenson, Moyer, Prentice, Ramsey, and Walker), and the Clerk-Treasurer of the Board of Education (Kuhnle).

[9] Complaint, Paragraph 24.

emphasized, would justify the non-retention of such a teacher for reasons which would not constitute "cause" for the non-retention of a tenured teacher under Ohio law.[10] On the other hand, the Board of Education's interest in flexibility would not justify non-retention "upon a basis wholly without support in fact or by a decision upon a wholly unreasoned basis." Procedural safeguards of notice and hearing would protect against "arbitrary" non-renewals. Furthermore, non-renewal of a teacher adversely affects his ability to pursue his career elsewhere, an injury which the Columbus school system clearly recognizes by affording teachers the option to resign. Orr's interest "in his professional standing and reputation is separate and apart from any interest in a particular job" and is "a determining factor" in deciding whether he is "entitled to a due process hearing before . . . dismissal from a job requiring professional competence." (*App.* 32-35).

On balance, Judge Kinneary concluded, "the interests of the school board and those of the teacher will both be fully protected by a procedure which advises the non-tenured teacher of a proposed purpose not to renew his contract and affords him a hearing at which the legitimacy of the reasons compelling such action is determined." The school board's interests are not jeopardized by such a procedure, he reasoned, because granting the teacher procedural safeguards does not deprive the Board of its right to utilize "bases for non-retention which would not satisfy the standard of cause, but which fit within the rationale for making a distinction between tenured and non-tenured teachers." (*App.* 36-37).

Judge Kinneary held that the "minimal requirements of procedural due process," in the circumstances, were (1) "a written statement of the reasons for the proposed non-renewal . . . prior to the time any final action is taken"; (2) adequate notice of a hearing; (3) "a hearing at which the

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[10] See p. 3, n. 5, *supra*.

teacher must be afforded an opportunity to submit relevant evidence controverting the stated reasons"; and (4) a statement by the Board of "the reason or reasons supporting the decision," should it ultimately decide to withhold renewal (*App.* 37).

Judge Kinneary ordered defendants to provide Orr with a statement of reasons and a hearing within 30 days (i.e. before commencement of the new school year), or else to re-employ him for the following year (*App.* 37-38).

Defendants moved for a stay of the order. In Judge Kinneary's absence, the motion was heard by Judge Hogan. He granted the stay solely upon condition that Orr's salary be continued during the pendency of the appeal, for he was of the view that defendants' actions had rendered Orr virtually unemployable. He noted that this is "a field in which reputation is a matter of concern." [11] Apprised of Orr's difficulties in attempting to secure other teaching employment, he remarked:

> "That's pretty understandable because, if a board won't negotiate with him, they are bound to tell that to anybody that inquires about him, and nobody is going to employ [him] . . . [S]ilence is damning here."[12]

Judge Hogan also observed that "teachers are somewhat like lawyers"; in the face of a refusal of the prior employer to explain the reason for termination, "What chance would you and I have, good as you are?" [13]

Defendants thereupon appealed, and sought and obtained a stay from Circuit Judge Peck of the obligation to continue Orr's salary.[14] On June 16, 1971, a year after Orr's em-

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[11] Transcript of hearing of August 12, 1970, p. 16.

[12] *Id.*, p. 12.

[13] *Id.*, pp. 17-18.

[14] The stay application was granted by Judge Peck, without referral to a panel, "due to requirements of time." The stay was granted before plantiff had even been served with a copy of the application. A subsequent motion by plaintiff for reconsideration was denied.

ployment and salary had ceased, the Sixth Circuit issued its decision reversing Judge Kinneary. It began by noting that "The Supreme Court has not decided the question with which we are confronted, and the Circuits are split" (*App.* 20). It then concluded "for two reasons" that Orr was not entitled to procedural due process. First, government employment is not "life, liberty or property," and accordingly its deprivation without due process cannot violate the Fourteenth Amendment (*App.* 27). Second, "in the unique situation of a probationary school teacher," the Board's right to "free and independent action" outweighs the teacher's interest "in knowing the reasons for the non-renewal of his contract and in confronting the Board on those reasons" (*App.* 27-28).

Judge Kinneary had relied heavily upon, and quoted extensively from, Judge Doyle's decision in *Roth* v. *Board of Regents,* 310 F. Supp. 972 (W.D. Wis.). The court below, reversing Judge Kinneary, recognized that its decision conflicted with *Roth* (*App.* 21). Two weeks after issuance of the decision below, the Seventh Circuit affirmed *Roth*—reaching precisely the opposite result from the court below—and cited Judge Kinneary's opinion in support of its holding. Because the Seventh Circuit's opinion in *Roth* is not yet officially reported, we have reprinted it in the Appendix to this petition (*App.* 39-54).

REASONS FOR GRANTING THE WRIT

I. *This Case Presents a Frequently Recurring Question Upon Which the Courts of Appeals Are In Conflict.*

The issue presented in this case—whether non-tenured teachers are Constitutionally entitled to a statement of reasons for non-renewal and a hearing prior to its effectuation—is one which has divided the Courts of Appeals, and

which is posed in literally dozens (perhaps hundreds) of cases now pending in the federal and state judicial systems.[15]

Almost all States provide "tenure" to those teachers who have taught in a school system for a specified number of years, affording them a statement of reasons and a hearing before their employment can be terminated at the end of a school year.[16] Only eleven states, however, expressly provide these procedural protections to *all* teachers.[17] In the remaining states, the federal courts have been called upon with mounting frequency to decide whether non-tenured teachers are *Constitutionally* entitled to such procedural protections.

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[15] In Ohio alone, there are at least ten other pending cases, involving fourteen terminated teachers, in which the same issue is presented. *Fannin* v. *Nestor,* Civ. Ac. No. 70-176 (S.D. Ohio); *Doughty* v. *Columbus Public Schools,* Civ. Ac. No. 70-181 (S.D. Ohio) (five terminated teachers are plaintiffs); *Fass* v. *Mt. Healthy City School District,* Civ. Ac. No. 8043 (S.D. Ohio); *Doyle* v. *Mt. Healthy City School District,* Civ. Ac. No. 8044 (S.D. Ohio); *Brown* v. *Mt. Healthy City School District,* Civ. Ac. No. 8045 (S.D. Ohio); *LuKace* v. *Acocks,* C. 71-146 (N.D. Ohio); *Hamrick* v. *Washington Local Sch. Dist.,* C. 71-166 (N.D. Ohio); *Lewandowsky* v. *Univ. of Toledo,* C. 71-167 (N.D. Ohio); *George* v. *Conneaut Board of Education,* C. 70-398 (N.D. Ohio); *Poddar* v. *Youngstown State Univ.,* C. 71-227 (N.D. Ohio).

[16] As of October, 1970, teacher tenure laws were in effect on a state-wide basis in 39 states and the District of Columbia, and on a less than state-wide basis in six other states. NEA Research Bulletin, March 1971, pp. 17-18 (National Education Association).

[17] Ten states provide notice and hearing to all teachers (whether or not tenured) by statute: Alaska, Arkansas, California, Connecticut, Iowa, Nevada, North Dakota, Rhode Island, Texas, and Washington (*Id.,* p. 19). Alaska Stat., tit. 14, ch. 20, § 180 (1966); Ark. Stat. Ann. § 80-1304(b) (Supp. 1969); Calif. Educ. Code § 13443 (West 1969); Conn. Gen. Stat. Ann. § 5-242 (Supp. 1969); Iowa Code Ann. § 279.13 (Supp. 1971); N.Dak. Code § 15-47-38 (Supp. 1969); R.I. Gen. Laws Ann. § 16-13-4 (1956); Texas Code Ann. § 21-204 (1969); Wash. Rev. Code Ann. § 28.67.070 (1964). In Maryland, the State Board of Education has decreed the same result by administrative decision. *Dietert* v. *Board of Education of Talbot County* (St. Bd. of Educ. May 26, 1971).

The Courts of Appeals have provided four different answers to this question:

(1) The Sixth Circuit (in the decision below), and the Fourth and Eighth Circuits, have held that non-tenured teachers are not Constitutionally entitled to either a statement of reasons or a hearing.[18]

(2) The First Circuit has held that non-tenured teachers are Constitutionally entitled to a statement of reasons (and, upon request, to access to their evaluation reports), but not to a hearing.[19]

(3) The Seventh Circuit has held that non-tenured teachers are Constitutionally entitled to both a statement of reasons and a hearing.[20]

(4) The Fifth Circuit has held that *some* non-tenured teachers (i.e. those with an "expectancy of reemployment") are Constitutionally entitled to both a statement of reasons and a hearing, but that *other* non-tenured teachers are entitled to neither.[21]

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[18] *Parker* v. *Board of Education of Prince George's County*, 348 F.2d 646 (4th Cir. 1965), affirming 237 F.Supp. 222 (D. Md. 1965), cert. denied 382 U.S. 1030 (1966); *Freeman* v. *Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969), cert. denied 395 U.S. 843 (1969).

[19] *Drown* v. *Portsmouth School District*, 435 F.2d 1182 (1st Cir. 1970), cert. denied 39 U.S.L.Week 3511 (May 17, 1971).

[20] *Roth* v. *The Board of Regents*, No. 18490 (7th Cir., July 1, 1971), reprinted *infra*, *App.* 39-54.

[21] *Ferguson* v. *Thomas*, 430 F.2d 852 (5th Cir. 1970); *Lucas* v. *Chapman*, 430 F.2d 945 (5th Cir. 1970). Additionally, the Fifth Circuit has held that even a non-tenured teacher who lacks expectancy of reemployment is Constitutionally entitled to a hearing — with somewhat different procedures — if he claims that the reason for non-renewal "is one impinging on his constitutional rights." *Lucas*, *supra*, 430 F.2d at 948; *Sindermann* v. *Perry*, 430 F.2d 934 (5th Cir. 1970), cert. granted 39 U.S.L.Week 3548 (June 14, 1971); *Thaw* v. *Board of Public Instruction*, 432 F.2d 98 (5th Cir. 1970). In the instant case, the court below expressly declined to decide whether Orr had an "expectancy of reemployment" in the Fifth Circuit's sense, concluding that he had no procedural due process rights in either event (*App.* 19, 24).

The opinions in the various Circuits have acknowledged the existence of the conflict. The court below recognized that "The Supreme Court has not decided the question with which we are confronted, and the Circuits are split" (*App.* 20). The Seventh Circuit, reaching the opposite result two weeks later, stated that "a conflict appears to exist between the Circuits."[22] The First Circuit, reaching a result different from both, stated that "Courts are divided on the issue of the administrative procedural rights to which a non-tenured public school teacher is entitled when he is not rehired."[23] So long as this conflict remains unresolved, the present heavy volume of litigation is likely to continue. Absent a clear holding by this Court that notice and/or hearing is required, school boards can be expected to continue denying such procedures. And absent a clear holding to the contrary, teachers can be expected to continue challenging such denials in 1983 actions. Manifestly, the present chaos in an area of such widespread importance is intolerable.

II. *Underlying the Conflict Is An Unresolved Legal Issue of Considerable Importance in The Development of the Law.*

The existing conflict has developed out of differing understandings of this Court's "procedural due process" decisions. This Court has declared that "the extent to which procedural due process must be afforded . . . is influenced by the extent to which [the person affected by governmental action] may be 'condemned to suffer a grievous loss' . . . and depends upon whether [his] interest in avoiding that loss outweighs the Governmental interest in summary adjudication." *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). See also *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1970). That the individual's interest may relate to a "privilege" rather than a "right" is not determinative. *Goldberg, supra.*

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[22] *Roth, supra,* reprinted *infra, App.* 44, n. 10.

[23] *Drown, supra,* 435 F.2d at 1183.

Abstractly, the loss of one's government employment would seem a "grievous loss" of such magnitude as to warrant affording procedural due process except where outweighed by a strong showing of governmental necessity. See, e.g. *Ricucci* v. *U.S.*, 425 F.2d 1252, 1256-57 (Ct. Claims 1970) (concurring opinion); *Kiiskila* v. *Nichols,* 433 F.2d 745, 747, n. 2 (7th Cir. 1970). But from time to time this Court has declared, in *dicta,* that government employment may be "summarily denied." See e.g., *Vitarelli* v. *Seaton,* 359 U.S. 535, 539 (1959); *Cafeteria Workers, supra,* 367 U.S. at 896-898 (and cases cited thereat).[24] The court below, and the Fourth and Eighth Circuits, have pointed to these *dicta* as the bases for their conclusion that a non-tenured teacher has no right to notice or hearing when denied reemployment. The Fifth Circuit, on the other hand, has held that a teacher with an "expectancy of reemployment" has a "property" interest sufficient to entitle him to procedural due process when its loss is threatened.[25]

Other Circuits have carried the analysis further, and have held that "whenever there is a substantial interest, *other than employment by the state,* involved in the discharge of a public employee" he is entitled to procedural due process. *Birnbaum* v. *Trussell,* 371 F.2d 672 (2d Cir. 1966).[26] These Circuits have identified two interests, apart from job retention, sufficient to entitle a teacher to procedural due process when non-renewal is contemplated.

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[24] But see *Goldberg, supra,* 397 U.S. at 262 ("relevant constitutional restraints apply *as much* to the withdrawal of public assistance benefits as to . . . discharge from public employment" (emphasis added)); *Greene* v. *McElroy,* 360 U.S. 474, 492 (1959); *Bell* v. *Burson,* 39 U.S.L.Week 4607, 4609 (May 25, 1971).

[25] *Ferguson* v. *Thomas, supra; Lucas* v. *Chapman, supra.*

[26] In *Birnbaum,* the Second Circuit held that a physician discharged from a public hospital allegedly for having exhibited racial bias was entitled to a due process hearing, because the discharge threatened two interests apart from his interest in the job itself: his reputation, and his ability to pursue his profession.

(1) The First and Seventh Circuits have recognized that a teacher whose employment is not renewed faces serious impairment of his reputation, and of his ability to pursue his teaching profession elsewhere.[27] The classroom is a uniquely sensitive arena, and a teacher whose reputation has been clouded by an unexplained non-renewal stands little chance of securing a teaching position in another school system. This fate, which actually befell Orr in the instant case, is a generally recognized consequence of teacher non-renewal. As the Rhode Island Commissioner of Education recently noted, in the teaching world non-renewal is considered a "dismissal," and "dismissal [of a teacher] from his position, whether it be during a school year or at the end of a school year can mean the end of his professional career." [28] Simi-

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[27] *Drown, supra,* 435 F.2d at 1184; *Roth, supra, App.* 43. This Court has identified reputation and the ability to pursue one's profession as interests which cannot be Governmentally infringed absent procedural due process. *Bell* v. *Burson,* 39 U.S.L.Week 4607, 4609 (May 25, 1971); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971); *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957); *Wiemann* v. *Updegraff,* 344 U.S. 183, 190-191 (1952). In *Cafeteria Workers,* this Court held that a short-order cook employed by a private contractor in a cafeteria on a military installation was not entitled to a hearing prior to the withdrawal of her access to the installation. Noting that her employer was prepared to employ her at another of its restaurants (367 U.S. at 888), this Court emphasized that "this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity" (*Id.* at 898); that there was no evidence that her "employment opportunities anywhere else" would be impaired (*Id.* at 898-899), and that she would not even be prevented from obtaining employment "on any other federal property" (*Id.* at 899, n. 10).

[28] *Domenicone* v. *School Committee,* R.I. Commissioner of Education, May 20, 1970, pp. 3, 4. Likewise, in *Chase* v. *Fall Mountain Regional School District,* Civ. Ac. No. 3122 (D.N.H., decided July 28, 1971), the Court concluded: "Non-renewal . . . is tantamount to dismissal. There is no doubt that non-renewal effectively prevents a teacher from obtaining another teaching position, thereby prevent-

larly the Chairman of the U.S. Civil Service Commission recently explained, "Being fired from government carries a stigma that prevents many employees from perhaps ever finding gainful employment again." [29]

(2) The second "protectible interest" which has been recognized in some of the cases is the teacher's liberty to exercise his First Amendment rights without fear of employment loss. This Court has repeatedly emphasized the unique importance of protecting the First Amendment rights of teachers,[30] and has held that a teacher may not Constitutionally be discharged for exercising such rights.[31] These holdings can be easily circumvented, however, if school boards can terminate teachers' employment without having to disclose the reasons for their action or defend those reasons in the crucible of a hearing. Indeed, there is a great danger that teachers' willingness to exercise their First Amendment rights will be chilled when they know that unwelcome speech can lead to unexplained non-renewal. "When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone . . . . The danger of that chilling effect upon the exercise of

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ing a teacher from pursuing his chosen profession." See also the remarks of Judge Hogan, *supra;* the First Circuit's recognition in *Drown* that a teacher's career "depends mainly on the willingness of public bodies to employ him", a willingness which "is seriously dissipated if not destroyed when an early employer refuses to rehire the teacher"; and the Seventh Circuit's observation in *Roth* that non-retention is "likely" to have an "adverse effect" upon "the career interests" of the individual.

[29] Statement of Robert Hampton, *Washington Evening Star,* April 12, 1971, p. A-8.

[30] *Keyishian* v. *Board of Regents,* 385 U.S. 589, 601-602 (1967); *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960); *Wieman* v. *Updegraff,* 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring),

[31] *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Keyishian, supra; Shelton, supra; Wieman, supra.* See also *Slochower* v. *Board of Education,* 350 U.S. 551 (1956).

vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 604 (1967). In order to assure against such a chilling effect, the Seventh Circuit has held that teachers are entitled to notice and a hearing if non-renewal is contemplated, "as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." [32] Similarly, the First Circuit has held that a statment of reasons for non-renewal must be provided, to "expos[e] any retributive effort infringing on . . . academic freedom." [33] See also Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439, 1453 (1968).

Whether any or all of these private interests are sufficient to require procedural due process as an incident of teacher non-renewal are questions which, in light of the conflict between the Circuits, should be decided by this Court.

III. *The Relationship of this Case to Perry v. Sindermann.*

This Court has already granted certiorari in *Perry* v. *Sindermann,* No. 70-36, a case which raises issues related to, but not the same as, those presented in the instant case. In *Sindermann,* a non-tenured college professor was denied renewal, and was told the reason. Believing that that reason constituted an infringement of his First Amendment rights, he instituted a § 1983 action, asserting that he had been denied both substantive due process (because terminated for a Constitutionally impermissible reason) and procedural due process (because not afforded a hearing). The Fifth Circuit held that he was entitled to an administrative hearing, and that he would ultimately be entitled to relief under § 1983 if he could establish that the non-renewal was based upon his exercise of First Amendment rights. The defendants peti-

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[32] *Roth, supra, App.* 44.

[33] *Drown, supra,* 435 F.2d at 1184.

tioned for certiorari, raising only the substantive due process question (i.e. whether non-renewal for the exercise of First Amendment rights is an infringement of due process).[34] The National Education Association filed an *amicus* brief urging that this Court also review the Fifth Circuit's holding on the procedural due process question, i.e. that a claim of Constitutional infringement entitles the teacher to an administrative hearing.[35] This Court granted certiorari without limiting the questions to be briefed.

It is most unlikely that this Court's decision in *Sindermann* will resolve the issues presented in the instant case. It is not altogether clear that the procedural due process issue in *Sindermann* is before the Court, and in any event the procedural question in *Sindermann* (whether a teacher who claims that non-renewal was motivated by improper reasons is entitled to an administrative hearing) is substantially different from, and was recognized by the Fifth Circuit as different from,[36] the question presented here (whether a teacher who does not know the reason for non-renewal nonetheless has protectible interests entitling him to an administrative hearing).

While the issues in *Sindermann* and this case are different, it would certainly be logical that the two cases be argued together. Both involve the rights of non-tenured teachers, and together they pose procedural due process considerations in the two contexts in which the problem most fre-

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[34] The petition noted that the Fifth Circuit's decision was in conflict with a decision of the Tenth Circuit holding that non-renewal cannot infringe due process irrespective of the reason therefor. *Jones* v. *Hopper*, 410 F.2d 1323 (10th Cir. 1969), cert. denied 397 U.S. 991 (1970).

[35] The NEA's *amicus* brief, while urging that certiorari be granted to resolve the conflict among the Circuits, made clear that on the merits the NEA supported the position of the respondent. (Brief for NEA, p. 4).

[36] *Sindermann* v. *Perry*, 430 F.2d 939, 943-944 (5th Cir. 1970).

quently arises: unexplained non-renewal (*Orr*) and non-renewal alleged to be for Constitutionally impermissible reasons (*Sindermann*).

CONCLUSION

For the reasons set forth hereinabove, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS

No. 20721

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS JUSTIN ORR, *Plaintiff-Appellee,*

v.

RAYMOND E. TRINTER, ET AL., *Defendants-Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

DECIDED AND FILED JUNE 16, 1971.

Before PHILLIPS, Chief Judge, and MILLER and KENT, Circuit Judges.

PHILLIPS, Chief Judge. The question presented on this appeal is whether a public school teacher who has not attained tenure status and whose contract of employment is not renewed has a constitutional right to be told the reason for the non-renewal and to a hearing.

This appeal arises out of a suit by Thomas Justin Orr, a white high school teacher, against the Columbus (Ohio) Public Schools (a statutory school district), the Columbus Board of Education and various officials of the Board, and Raymond E. Trinter, the principal of Walnut Ridge High School in Columbus. The complaint alleges that Orr's constitutional rights were violated when, without being given

any reason, hearing or other "procedural due process rights" the Board failed to renew his employment contract and that as a consequence he has a claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Federal jurisdiction is asserted under 28 U.S.C. § 1343(3).

The District Court entered judgment for Orr, and ordered that:

> "[T]he defendants deliver to plaintiff's counsel a written statement of the reasons upon which the defendants relied in deciding not to renew plaintiff's limited teaching contract, that the defendants set a hearing date and cause notice of such date to be given plaintiff's counsel, that said notice advise plaintiff that at the hearing he will be given an opportunity to present evidence relating to the reasons given for the decision not to renew his limited teaching contract and that within fifteen days of the hearing the defendants advise plaintiff of its decision." 318 F.Supp. at 1046.

We reverse.

Orr holds Bachelor of Arts and Master of Arts degrees. He is certified provisionally by the Ohio Department of Education to teach English, history and government in any Ohio School district for grades seven through twelve. During the 1969-70 school year he was employed as a tenth grade teacher at Walnut Ridge High School in Columbus under a limited teaching contract. Under this contract, he was considered a probationary teacher and had no tenure. It is unclear whether he could be considered to have an expectancy of reemployment. No Ohio decisions on that point have been found. The Ohio code provides that:

> "Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed, re-employed under the provisions of this section at the

> same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly." *Ohio Revised Code,* 3319.11 (Supp. 1970).

On April 10, 1970, Orr was informed by defendant Trinter that his contract of employment would not be renewed for the 1970-71 school year. Orr was told that if he resigned on or before April 15, 1970, his record would show no action by the Board of Education.

Orr refused to resign. On April 28, 1970, after a review of the case and a public discussion of its merits in the presence of Orr but without his participation, Orr received written notice from the Board of Education that his limited teaching contract for the 1969-70 school year would not be renewed. No reasons for this action were indicated on the notice.

On May 1, 1970, and again on May 22, 1970, Orr requested a written disclosure of the reasons for the refusal to renew his teaching contract. The Board did not respond to these requests. This litigation followed.

The case was submitted to the District Court on the complaint, defendants' motion to dismiss for failure to state a claim for which relief can be granted, agreed stipulations of fact and memoranda of the parties.

The Supreme Court has not decided the question with which we are confronted, and the Circuits are split.

Under facts substantially similar to those that are before us, the First Circuit has held that the teacher is entitled to

a "written explanation, in some detail, of the reasons for non-retention," but "that a hearing is not constitutionally compelled." *Drown* v. *Portsmouth School Dist.*, 435 F.2d 1182, 1185 (1st Cir.).

Conversely, the Fifth Circuit has held that no reasons or hearing are required. *Thaw* v. *Board of Instruction,* 432 F.2d 98 (5th Cir.). *But see, Sindermann* v. *Perry,* 430 F.2d 939 (5th Cir.) (dicta), *petition for cert. filed,* 39 U.S.L.W. 3303 (U.S. Jan. 12, 1971) (No. 952).

Moreover, several District Courts, in addition to the District Court in the present case, have considered the issue. The results of these decisions are likewise varied. *Compare, Schultz* v. *Palmberg,* 317 F.Supp. 659 (D. Wyo.) and *Bonner* v. *Texas City Independent School District,* 305 F.Supp. 600 (S.D. Tex.), *with Gouge* v. *Joint School District No. 1,* 310 F. Supp. 984 (W.D. Wis.); *Roth* v. *Board of Regents,* 310 F. Supp. 972 (W.D. Wis.) (Appeal pending 7th Cir.) and *Lucia* v. *Duggan,* 303 F. Supp. 112 (D. Mass.).

A review of several closely related cases from the various Circuits also show divergent opinions. The Eighth Circuit has decided two pertinent cases. In *Freeman* v. *Gould Special School District,* 405 F.2d 1153 (8th Cir.), *cert. denied,* 396 U.S. 843, several non-tenured Negro school teachers brought a § 1983 action as a consequence of the fact that they were not rehired. Racial discrimination was not an issue on appeal, and the controversy resolved to whether the Board's action in requiring the teachers to secure their principal's approval of a new contract was "arbitrary and capricious and a denial of federal due process under the Fourteenth Amendment." *Id.* at 1157. The court rejected plaintiffs' contention "that the Board must accord due process, both substantive and procedural, in all of its operative procedures." *Id.* at 1160. According to the Court:

> "If this were so, we would have little need of tenure or merit laws as there could only be, as argued by the plaintiffs, a discharge for cause, with the school board

> carrying the burden of showing that the discharge was for a permissible reason. We do not believe this to be the law, as there are many public employees who are separated from their employment by a purely arbitrary decision, upon a change of administration or even a change of factual control where the appointments are not protected by civil service or some type of tenure, statutory or contractual." *Id.*

In another § 1983 case, *Brooks* v. *School District,* 267 F.2d 733 (8th Cir.), *cert. denied,* 361 U.S. 894, the Eighth Circuit affirmed the District Court's decision that plaintiffs had failed to sustain their burden of proof on their claim of dismissal based on racial grounds. In discussing the law the court said:

> "School boards are vested with wide discretion in matters affecting school management, including the employment of teachers, and a court may not interfere with the board's action unless the board has exercised its power in an unreasonable, arbitrary, capricious, or unlawful manner. *State ex rel. Wood* v. *Board of Education,* 357 Mo. 147, 206 S.W.2d 566; *Morris* v. *Williams,* D.C. E.D.Ark., 59 F.Supp. 508, 510; 78 C.J.S. Schools and School Districts § 128, pages 920-923." *Id.* at 739.

The Fourth Circuit has held that a failure to rehire could be such an arbitrary and capricious act as to violate Fourteenth Amendment due process rights. *See, Johnson* v. *Branch,* 364 F.2d 177 (4th Cir.), *cert. denied,* 385 U.S. 1003.

In addition to the *Thaw* case previously discussed, the Fifth Circuit has decided several other pertinent cases. In *Lucas* v. *Chapman,* 430 F.2d 945 (5th Cir.), the Court held that a claim of failure to rehire due to exercise of First Amendment rights was cognizable under § 1983, and that a hearing before the Board was mandatory. The Court then

distinguished, at page 947, its decision from the situation "where the only matter in issue is a difference of view over a school board's exercise of judgment and discretion concerning matters non-constitutional in nature," which, it said, did not require the board to hold a hearing. The court then commented on some inbetween situations.

> "If the board asserts non-constitutional reason and the teacher claims it is a sham and that the real reason is one impinging on his constitutional rights, he must be afforded a hearing. Also, even in the area of non-constitutional reasons, the board's decision must not be wholly unsupported by evidence else it would be so arbitrary as to be a constitutional violation. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed2d 796 (1957); *United States ex rel. Vajauer* v. *Commissioner of Immigration,* 273 U.S. 103, 106, 47 S.Ct. 302, 303, 71 L.Ed. 560, 563 (1927)." *Id.* at 948.

In another line of cases, the Fifth Circuit has considered as determinative on the question of the right to a hearing before the board the fact that the teacher either does or does not have an expectancy of reemployment. If he does have this expectancy, a hearing is required. If he does not have the expectancy, the duty is on the teacher to initiate a hearing and prove that the Board is wrong. *Sindermann* v. *Perry,* 430 F.2d 939 (5th Cir.), *petition for cert. filed,* 39 U.S.L.W. 3303 (U.S. Jan. 12, 1971) (No. 952). *See also, Ferguson* v. *Thomas,* 430 F.2d 852 (5th Cir.).

The Second Circuit also has used the expectancy of reemployment test, *Bomar* v. *Keyes,* 162 F.2d 136, 139 (2d Cir.), *cert. denied,* 332 U.S. 825, to define the interest which the law will protect.

The Tenth Circuit, on the other hand, has held that an expectancy of reemployment is not an interest which is secured by the Constitution of the United States, *Jones* v.

Hopper, 410 F.2d 1323 (10th Cir.), *cert. denied,* 397 U.S. 991.[1]

As heretofore stated, it is not clear whether Orr had an expectancy of reemployment under § 3319.11 of the Ohio Revised Code, quoted above. We assume from the filing of the instant action that he had a personal desire and expectation to continue in his employment as a teacher at Walnut Ridge High School. Personal desire and expectation, however, are not the equivalent of expectancy of reemployment in contemplation of law. Whatever expectancy of employment Orr may have had during his probationary period and prior to attaining tenure status was not subject to constitutional protection, but was subject to the discretion of the Board of Education not to renew his contract.

In a recent decision, *Tichon* v. *Harder,* 438 F.2d 1396 (2nd Cir.), involving the discharge of a probationary Social Worker in the Connecticut Department of Welfare, the Second Circuit held that "in certain instances the denial of procedural due process, standing alone, may not be sufficient to state a claim under § 1983, and that jurisdiction therefore would not lie under § 1343(3)."

A somewhat comparable situation was presented to this court in *Hopkins* v. *Wasson,* 329 F.2d 67 (6th Cir.), *cert denied,* 379 U.S. 854, *affirming,* 227 F.Supp. 278 (E.D. Tenn.). In that case the contract of employment of a nontenured public school teacher was not renewed by the Board of Education. The teacher sued school officials for common law slander and for deprivation of civil rights under 42 U.S.C. §§ 1981-88. This court affirmed the opinion of District Judge Frank W. Wilson, who said:

> "Turning now to the question of whether the plaintiff has stated a cause of action for violation of her civil

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[1] In *Greene* v. *Howard University,* 412 F.2d 1128 (D.C. Cir.), the Court of Appeals for the District of Columbia, in the only related case we have found from that Circuit, determined the rights of discharged college professors on contractual grounds.

rights, the Court is of the opinion that she has not, and that the motion for summary judgment must therefore be sustained as to the civil rights claim of the complaint.

"In her complaint, the plaintiff alleges merely that the defendants failed to rehire her at the expiration of the 1959-1960 school year. There is no allegation that the plaintiff's contract was breached or that the obligation thereof was impaired. Upon the contrary, the complaint acknowledges that the plaintiff's contract had expired, and further that the plaintiff was not on tenure under the laws of the State of Tennessee. Accordingly, she had no right, statutory or contractual, to be rehired, and nothing in Title 42 U.S.C.A. §§ 1981-1988 entitles her to redress for not being rehired under these circumstances." 227 F.Supp. at 279-80.

The Supreme Court has held that where State action denies a person a license or the opportunity to practice his chosen profession, due process requires that he be given a hearing and a chance to respond to the charges against him. *See, e.g., Greene* v. *McElroy,* 360 U.S. 474; *Schware* v. *Board of Bar Examiners,* 353 U.S. 232.

However, since there is no constitutionally protected right to government employment, *Bailey v. Richardson,* 86 U.S. App. D.C. 248, 182 F.2d 46, *aff'd by an equally divided Court,* 341 U.S. 918, such a hearing is not required where the only thing at stake is a specific job. *Cafeteria Workers Union, Local 473* v. *McElroy,* 367 U.S. 886.

From our review of these and other cases we can summarize what we consider to be the law related to the issue before this court. To prove a claim under 42 U.S.C. § 1983, a plaintiff must show (1) action taken under color of State law, and (2) a deprivation of a constitutional right as a result of that action, *Jones* v. *Hopper,* 410 F.2d 1323 (10th Cir.), *cert. denied,* 397 U.S. 991. In their brief before this court defendants contest the element of State action. We think it is clear, however, that the failure to rehire plaintiff

undoubtedly was under color of State law. Stipulation No. 27 in the record is as follows: "All of the above-said acts [i.e., refusal to rehire without reasons or a hearing] of the Defendants were done pursuant to State law." *See also, Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir.), *cert. denied,* 332 U.S. 825. We proceed directly to the question of whether the failure to rehire deprived plaintiff of any constitutional rights.

Initially we recognize that plaintiff does not have a constitutional right to public employment. *Cafeteria Workers Union, Local 473* v. *McElroy, supra.* However, even though "one may not have a constitutional right to go to Bagdad, . . . the Government may not prohibit one from going there unless by means consonant with due process of law." *Homer* v. *Richmond,* 110 U.S. App. D.C. 226, 229, 292 F.2d 719, 722.[2] Hence it is no longer open to debate that plaintiff would be entitled to relief if the board had refused to rehire him because he had exercised his rights as guaranteed by the free speech clause of the First Amendment, *Pickering* v. *Board of Education,* 391 U.S. 563, *Board of Trustees of Arkansas A & M College* v. *Davis,* 396 F.2d 730 (8th Cir.), *cert. denied,* 393 U.S. 962; by the self incrimination clause of the Fifth Amendment, *Slochower* v. *Board of Higher Education,* 350 U.S. 551; by the due process clause of the Fifth or Fourteenth Amendments, *Greene* v. *McElroy,* 360 U.S. 474; or by the equal protection clause of the Fourteenth Amendment, *Hatton* v. *County Board of Education,* 422 F. 2d 457 (6th Cir.); *Rolfe* v. *County Board of Education,* 391 F.2d 77 (6th Cir.). These are constitutionally impermissible reasons for refusal to rehire a teacher. Conversely courts have recognized as constitutionally permissible reasons for refusal to rehire the fact that the teacher is not as well qualified as another applicant, *Brooks* v. *School District,* 267 F. 2d 733 (8th Cir.), *cert. denied,* 361 U.S. 894; or because of

[2] *Quoted* in *Cafeteria Workers Union, Local 473* v. *McElroy, supra,* 367 U.S. at 894.

a reduction in force, *Walton* v. *Nashville, Arkansas Special School District No. 1,* 401 F.2d 137 (8th Cir.).

Orr does not complain that he was dismissed as a result of exercising his right of free speech, his right against self-incrimination, or as a result of racial discrimination in violation of his right to equal protection of the laws under the Fourteenth Amendment. If he had elected to sue upon such a theory, appropriate averments could have been made in the complaint and he could have proceeded to a trial and presented evidence in the District Court, rather than submitting his case on a stipulation of facts. However, he did not so elect. Rather, his primary contention is that the failure to give reasons for the non-renewal of his contract and a hearing at which he can challenge the reasons is itself a constitutional violation. He argues that the refusal to rehire him without giving any reasons was arbitrary and capricious action, thus violating his substantial rights under the Fourteenth Amendment due process clause. We reject this argument for two reasons.

First, the Fourteenth Amendment only protects against the State depriving one of life, liberty, or property without due process of law. "It has been held repeatedly and consistently that Government employ is not 'property.' . . . We are unable to perceive how it could be held to be 'liberty.' Certainly it is not 'life.' " *Bailey* v. *Richardson,* 182 F.2d 46 (D.C. Cir.), *aff'd by an equally divided Court,* 341 U.S. 918.

Second, in the unique situation of a probationary school teacher, the failure to give reasons for the refusal to rehire is not arbitrary and capricious action on the part of the Board since the very reason for the probationary period is to give the Board a chance to evaluate the teacher without making a commitment to rehire him. A non-tenured teacher's interest in knowing the reasons for the non-renewal of his contract and in confronting the Board on those reasons is not sufficient to outweigh the interest of the Board in free and

independent action with respect to the employment of probationary teachers. The Board is not a legal tribunal. It is an employer, and when it decides to hire or not to hire a particular teacher, it is acting "as proprietor, to manage the internal operation" of the public schools. *Cafeteria Workers, Local No. 473* v. *McElroy, supra,* 367 U.S. at 896. As was stated by Mr. Justice Brennan in his dissent in *Nelson* v. *Los Angeles County,* 362 U.S. 1, at 16:

> "Doubtless a probationary employee can constitutionally be discharged without specification of reasons at all; and this Court has not held that it would offend the Due Process Clause, without more, for a State to put its entire civil service on such a basis, if as a matter of internal policy it could stand to do so."

While an employee may not be barred from future employment for reasons that are patently arbitrary or discriminatory, *Cafeteria Workers Union, Local 473* v. *McElroy, supra,* this does "not alter the power of the [Board] to discharge summarily an employee in [plaintiff's] status, without giving any reason." *Vitarelli* v. *Seaton,* 359 U.S. 535, 539. If such action is constitutionally permissible in the discharge of an employee, then assuredly it is permissible in the refusal to renew the contract of a probationary teacher. We hold that it was neither arbitrary nor capricious to refuse to renew plaintiff's contract without giving any reason for that decision.

On the other hand, if the reason, either as stated by the Board or as suspected by the teacher, for the refusal to rehire the teacher is constitutionally impermissible, the teacher can state a claim for which relief can be granted under 42 U.S.C. § 1983. We cannot agree that the refusal to rehire plaintiff without giving reasons is itself a violation of either substantive or procedural due process. We hold that the failure to give a reason for the refusal to rehire, or to grant a hearing in connection therewith, standing alone, is not

constitutionally impermissible conduct on the part of the Board of Education.

The Board is presumed to have acted lawfully. *See,* 29 Am. Jur.2d, *Evidence,* §§ 168 et seq., and cases collected therein. In the absence of an allegation in the complaint of constitutionally impermissible conduct, no claim under § 1983 is stated.

In conclusion we emphasize that an essential feature of State teacher tenure laws is to require a teacher to serve a probationary period before attaining the rights of tenure. State statutes prescribe the rights of tenured teachers to written charges, public hearings and judicial review. The determination as to whether the quality of services of a particular teacher entitles him to continued employment beyond the probationary period, thereby qualifying him for tenure status, or whether his contract of employment should not be renewed prior to attainment of tenure status, is the prerogative of the employer, the Board of Education. In the present case Orr seeks to persuade this court to render a decision which would confer certain tenure privileges upon non-tenured teachers—in effect to amend the Ohio statute by judicial decree. This we decline to do.

The decision of the District Court is reversed. The case is remanded with instructions to dismiss the complaint.

APPENDIX B

OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION 70-163

THOMAS JUSTIN ORR,
Plaintiff,

v.

RAYMOND E. TRINTER, ET AL,
Defendants.

OPINION AND ORDER

(Filed August 3, 1970)

This matter has been submitted to the Court on the complaint, defendant's motion to dismiss for failure to state a claim for which relief can be granted, stipulations (substituted for findings which would have been made as a result of a trial on the merits) and memoranda of the parties.

The plaintiff, Thomas Justin Orr, is a school teacher holding a Bachelor of Arts degree and a Master of Arts degree. He is provisionally certified by the Ohio Department of Education to teach English, history and government in any Ohio school district to grades seven through twelve.

Plaintiff was employed during the 1969-1970 school year as a tenth grade English and history teacher at Walnut Ridge High School, Columbus, Ohio under a limited teaching contract.

On April 10, 1970, plaintiff was informed by defendant Trinter, Principal of Walnut Ridge High School, that his

contract of employment would not be renewed for the 1970-1971 school year, and he was told that, if he resigned on or before April 15, 1970, his record would show no action by the Board of Education.

Plaintiff did not resign. The defendants did not give plaintiff reasons for their proposed decision not to renew his limited teaching contract. The defendant, Columbus Board of Education, met on April 28, 1970 and reviewed plaintiff's case and held a public discussion of its merits.

Plaintiff was present at the meeting of the Board of Education, but he did not participate in the review of his case or the discussion. Plaintiff was given written notice that his limited teaching contract for the 1969-1970 school year would not be renewed. No reasons were given for the nonrenewal.

On May 1, 1970 and May 22, 1970, subsequent to the action by the Board of Education, plaintiff requested a written disclosure of the reasons for the refusal to renew his teaching contract. Defendants did not respond to these requests.

Plaintiff contends that the defendants deprived him of due process of law under the Fourteenth Amendment in that they refused to renew his limited teaching contract without providing him (1) written notice of the proposed nonrenewal, (2) written notice of a hearing on the reasons supporting nonrenewal and (3) a hearing at which he could present his case and confront his accusers.

Defendants contend that the action should be dismissed because they have no constitutional duty to provide plaintiff a hearing on the reasons for the nonrenewal of his limited teaching contract.

The Court has jurisdiction under the provisions of Title 28, United States Code, Section 1343(3); Title 42, United States Code, Section 1983; and Title 28, United States Code, Sections 2201, 2202.

Defendant asserts that government employment is not a

property right, but a privilege, and therefore a government employee has no absolute right to a due process hearing on the reasons for the discontinuation of his employment. *Cafeteria Workers* v. *McElroy,* 367 U.S. 866, 894-895 (1960); *Birnbaum* v. *Trussell,* 371 F.2d 672, 677 (2d Cir. 1968); *Jones* v. *Hopper,* 410 F.2d 1323, 1327-1329 (10th Cir. 1969); *Parker* v. *Board of Education,* 237 F.Supp. 222, 227-228 (D.Md. 1965), 348 F.2d 464 (4th Cir. 1965) *cert. den.* 382 U.S. 1030 (1966).

A statement of the general rule does not end the Court's inquiry. The employment of a teacher in a public school cannot be terminated because he exercised a constitutional right. *Slochower* v. *Board of Education,* 350 U.S. 551, 555-556 (1956); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-606 (1967); *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968). Further, the Court must balance the precise nature of the governmental function involved against the private interest affected by the termination of employment to determine whether notice and hearing are required. *Cafeteria Workers* v. *McElroy, supra* at 895; *Birnbaum* v. *Trussell, supra* at 678; *Roth* v. *Board of Regents,* 310 F. Supp. 972, 976-977 (D. Wisc. 1970).

In the instant case on the facts as stipulated by the parties, there is no evidence that the plaintiff's employment was terminated because he exercised a constitutional right. Therefore, the Court is solely concerned with determining the nature of the governmental and private interests and then balancing them to determine whether plaintiff is entitled to due process hearing at which the defendants must find reasons for refusing to renew his teaching contract.

The Court in *Roth* v. *Board of Regents, supra* at 976-982 and *Gouge* v. *Joint School District No. 1,* 310 F.Supp. 984, 991 (D. Wisc. 1970) thoroughly discussed the nature of the state's function and interest in operating a public school system and the interest of a non-tenured school teacher whose contract is not renewed. The *Roth* Court found the school

board had an interest in assembling and preserving a community of teachers. The Court continued:

> I am to consider how vital it is to this interest that during a relatively short initial interval the university [public school system] be free arbitrarily to decide not to retain a professor [teacher], so long as its decision is not based upon his exercise of freedoms secured to him by the Constitution. The concept of tenure obviously enjoys a rational basis, as well as a traditional basis. It is reasonable that there be a time in which to observe a new teacher and scholar and that the university [public school system] retain during that time a considerable latitude in deciding whether he should remain. It is reasonable that after a period of time, or after the newcomer has won a certain measure of acceptance reflected in his academic rank, he should acquire rather strong protection against nonretention; such an arrangement is conducive to productive and perhaps controversial effort. Thus it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who has not yet won sufficient respect from his colleagues. And it is reasonable that thereafter this available spectrum of reasons be sharply narrowed and confined to those amenable to articulation and demonstration.
>
> The core issue here, however, is more difficult. No interest of the university is directly served by a regime in which a decision to retain a newcomer may be made upon a basis wholly without support in fact or by a decision upon a wholly unreasoned basis. If the university is forbidden, constitutionally, to rest its decision on such an arbitrary basis, the question arises: in practice will the university become so inhibited that the available spectrums of reasons for non-retention in the two situations will merge, the distinction between ten-

> ure and absence of tenure will shrink and disappear, and the university will be unable to rid itself of newcomers whose inadequacies are promptly sensed and grave but not easily defined? It will not do to ignore this danger to the institution and to its central mission of teaching and research.
>
> As against this danger, however, there is to be set the interest of the individual new professor. To expose him to non-retention because the deciding authority is utterly mistaken about a specific point of fact, such as whether a particular event occurred, is unjust. To expose him to non-retention on a basis wholly without reason, whether subtle or otherwise, is unjust. There can be no question that, in terms of money and standing and opportunity to contribute to the educational process, the consequences to him probably will be serious and prolonged and possibly will be severe and permanent. "Badge of infamy" is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career. *Roth* v. *Board of Regents, supra* at 978-979.[1]

The Court recognizes that a public school system has an interest in providing the best education possible for the children within its district, and further, that this duty requires it to exercise its best judgment as to the qualifications of individual teachers to fulfill this objective. There could be no more important public obligation, and a school board should be free to choose the most efficient method consonant with the Constitution and state law to achieve the goal of proving a good education to the children within its jurisdiction.

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[1] Although the plaintiff in *Roth* was a university professor, the reasoning set out is applicable to public school teachers. *Gouge* v. *Joint School District No. 1, supra* at 991. *Roth* and *Gouge* were companion cases decided by the same Court.

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitudes of young minds toward the society in which they live. In this, the state has a vital concern. *Shelton* v. *Tucker,* 364 U.S. 479, 485 (1960).

But measured against this responsibility, which the Court reiterates the school board must be permitted to fulfill, is the private interest of the school teacher that is affected by termination. The Court cannot ignore the very real consequences to the teacher of a nonrenewal of his contract. A decision not to renew a nontenured teacher's contract for employment is recognized by educators to be very similar to a dismissal. *See, Michael A. Domenicone* v. *School Committee of the Town of Smithfield,* Rhode Island Commission of Education, May 20, 1970.

This same conclusion may be drawn from the stipulated facts in evidence. Plaintiff was told by the defendant Trinter, Principal of Walnut Ridge High School, that if he resigned on or before April 15, 1970, his record would not reflect action by the Board of Education refusing to renew his contract. The clear inference is that plaintiff would have benefited by resigning, rather than having board action shown on his record. The only conceivable benefits are plaintiff's professional standing and the effect of a public discussion on his professional reputation.

This interest of plaintiff in his professional standing and reputation is separate and apart from any interest in a particular job. Such an interest has been recognized by courts as being a determining factor in whether members of other professions are entitled to a due process hearing before their dismissal from a job requiring professional competence. In *Birnbaum* v. *Trussell, supra,* for example, the Court held that a doctor who was dismissed by a hospital as an attending physician had a substantial interest in not being dismissed on arbitrary grounds and not being dismissed without a hearing at which a fair determination of whether or not

reasonable grounds existed was made. The interests recognized were his professional reputation and his ability, following dismissal, to pursue a profession effectively.

The Court can perceive no real difference between the dismissal of a doctor from a hospital staff and the failure to renew the contract of a nontenured teacher. Indisputably, each faces the possibility of some damage to his professional reputation and to his ability to pursue his chosen profession.

The question remains whether, when the interest of the state and the interest of the individual are balanced, the school board's interest can only be achieved through the procedure of refusing to renew a nontenured teacher's contract without stating reasons therefor or holding a hearing to determine the existence of valid reasons. The Court finds that the interests of the school board and those of the teacher will both be fully protected by a procedure which advises the nontenured teacher of a proposed purpose not to renew his contract and affords him a hearing at which the legitimacy of the reasons compelling such action is determined. *Roth* v. *Board of Regents, supra; Gouge* v. *Joint School District No. 1; see Parducci* v. *Rutland,* Civ. No. 3072-D, M.D. Ala., June 9, 1970.

The Court holds that a school board's decision not to renew the teaching contract of a nontenured teacher "may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason." *Roth* v. *Board of Regents, supra* at 979. This due process standard recognizes the school board's interest in maintaining an employment system using the categories of tenured and nontenured teachers. A tenured teacher may not be dismissed except for "good and just cause." Section 3319.16, Ohio Revised Code. It naturally follows that a school board may refuse to renew the contract of a nontenured teacher for less than cause. Section 3319.11, Ohio Revised Code. Therefore a reviewing court will be bound to respect bases for nonretention which would not satisfy the standard of cause, but which fit within the ration-

ale for making a distinction between tenured and nontenured teachers.

The Court holds that the minimal requirements of procedural due process include:

1. A written statement of the reasons for the proposed nonrenewal of the limited teaching contract transmitted to the teacher prior to the time any final action is taken.

2. Adequate notice of a hearing at which the teacher may respond to the stated reasons for the proposed nonrenewal of the teaching contract.

3. A hearing at which the teacher must be afforded an opportunity to submit relevant evidence controverting the stated reasons.

4. If the board of education finds that the nontenured teacher's limited teaching contract should not be renewed, it must state the reason or reasons supporting the decision.

The initial burden of producing evidence is upon the teacher. If he presents evidence which shows that the stated reasons do not justify a decision not to renew his contract, then the board of education officials requesting his nontenure have the burden of showing that the reasons are appropriate and substantiated by facts.

Of course, a teacher may waive his rights to notice and hearing, if he so desires.

IT IS HEREBY ORDERED THAT the defendants deliver to plaintiff's counsel a written statement of the reasons upon which the defendants relied in deciding not to renew plaintiff's limited teaching contract, that the defendants set a hearing date and cause notice of such date to be given plaintiff's counsel, that said notice advise plaintiff that at the hearing he will be given an opportunity to present evidence relating to the reasons given for the decision not to renew

his limited teaching contract and that within fifteen days of the hearing the defendants advise plaintiff of its decision.

IT IS FURTHER ORDERED THAT should the defendants elect not to comply with this Order within thirty (30) days of the date of filing, the defendants shall be required, on or before September 1, 1970, to offer plaintiff a limited teaching contract for the 1970-1971 school year on terms and conditions no less favorable than those contained in his contract for the 1969-1970 school year.

JOSEPH P. KINNEARY,
United States District Judge.

APPENDIX C

Seventh Circuit's Opinion in Roth v. Board of Regents

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 SEPTEMBER SESSION, 1970

No. 18490

DAVID E. ROTH, for himself and for all others similarly situated,

Plaintiff-Appellee,

v.

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN.

JULY 1, 1971

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD and KERNER, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* In this case (involving an official decision at a state university not to reemploy a nontenured professor) the parties each made motions for summary judgment. The district court decision is reported at 310 FSupp. 972. Defendants' motion was denied, and plaintiff's motion was granted in part. The order appears on pages

983 and 984. Defendants have appealed from the judgment accordingly entered. Although such judgment did not finally dispose of all issues, and no direction was made under Rule 54(b) F.R.C.P., it amounted to an injunction, and was appealable as such under 28 U.S.C. § 1292(a)(1).

The facts, the disposition of the motions, and the reasoning employed are well stated in the opinion of the district court, and we shall avoid unnecessary repetition. It suffices, now, to say that during the school year '68-'69, plaintiff was a non-tenured professor at a state university who claimed (1) that the reason for defendants' decision not to retain him for the school year '69-'70 was to retaliate for plaintiff's constitutionally protected expression of opinion and (2) that even as a non-tenured member of the faculty he was constitutionally entitled either to be retained or to be given a hearing on the merits of the decision not to retain him.

With respect to issue (1), which may be termed substantive, the district court decided there were issues of fact. Such issues have not been determined and the respective claims concerning them are before us only as background. With respect to issue (2), which may be called procedural, the district court decided that plaintiff had been entitled at the administrative level to be offered a statement of the reasons why he was not to be retained and a hearing at which he could respond. Accordingly, the court ordered defendants to deliver the statement and provide for the hearing, or, in the alternative, to offer a contract for the ensuing school year. By the time of the decision the upcoming school year was '70-'71. The district court stayed its order pending appeal, and the upcoming school year is now '71-'72.

The district court made it clear that the prescribed procedure was designed to safeguard a due process right that "the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason," and that the

"standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure." (p. 979.)

Defendants do not question the proposition, documented by the district court at page 976, that the "employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States." They would say that the proposition (which they deny) that reemployment was denied plaintiff because of his exercise of protected rights is for him to prove, if he is able, in the branch of this case which is not now before us.

The contest on this appeal is whether the state university, in deciding not to retain a non-tenured professor, must initially shoulder the burden of exposing to the limited test ordered by the district court the reasons on which its decision is predicated, and to that extent demonstrate that its reasons are not impermissible, or whether the first recourse of the professor is to attempt to establish in the judicial forum that the reasons are impermissible.

Defendants rely on the traditional principle "that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." [1]

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[1] *Cafeteria Workers* v. *McElroy* (1961), 367 U.S. 886, 896, 6 LEd2d 1230, citing *Vitarelli* v. *Seaton* (1959), 359 U.S. 535, 539, 3 LEd2d 1012. Those decisions did not involve teachers, but the principle was assumed in *Shelton* v. *Tucker* (1960), 364 U.S. 479, 486, 5 LEd2d 231, involving state university as well as public school teachers, and has been followed in other decisions involving non-tenured teachers: *Jones* v. *Hopper* (10th Cir., 1969), 410 F2d 1323, 1329, cert. den. 397 U.S. 991; *Freeman* v. *Gould Special Sch. Dist. of Lincoln County, Ark.* (8th Cir. 1969), 405 F2d 1153, 1159, cert. den. 396 U.S. 843; *Williams* v. *School District of Springfield R-12* (Mo., 1969), 447 SW2d 256, 270; *Henry* v. *Coahoma County Board of Education* (N.D.Miss., 1963), 246 FSupp. 517, 521, aff'd 5th Cir. 353 F2d 648, cert. den. 384 U.S. 962; *Hopkins* v. *Wasson* (E.D.Tenn., 1962), 227 FSupp. 278, aff'd, 6th Cir., 329 F2d 67, cert. den. 379 U.S. 854.

Cafeteria Workers,[2] involved denial by government of an individual's access to a government facility, resulting in inability to continue private employment at that facility. Although the Supreme Court suggested that the individual's interest in access to her job was closely analogous to the interest of a government employee in retaining his job, and in that connection stated the principle relied on by defendants, the Court also held that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." This was the balancing formula which the district court applied in the instant case, reaching a result different from the result in *Cafeteria Workers*.[2a]

The opinion in *Cafeteria Workers* itself suggests that if the government action jeopardized a right to follow a chosen trade or profession, that fact would weigh upon the side of the individual. In *Goldberg* v. *Kelly*[3] the Supreme Court referred generally to relevant constitutional restraints applying to discharge from public employment, among other types of government action, and after stating that "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication," quoted the balancing language from *Cafeteria Workers*. The Supreme Court has held that one who applies for a license to practice a profession is entitled to procedural safeguards not required in *Cafeteria Workers* "where only 'the opportunity to work at one isolated and specific military installa-

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[2] Supra, fn. 1.

[2a] *See Kinkila* v. *Nichols* (7th Cir., 1970), 433 F2d 745.

[3] (1970), 397 U.S. 254, 262.

tion' was involved."[4] Several courts have found a due process right where dismissal or non-retention of a public employee jeopardized an interest in practicing a profession, or in preserving a professional reputation.[5] We think the district court properly considered the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor and concluded, after balancing it against the governmental interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection.

We note that the Supreme Court has denied certiorari in several cases where a court of appeals has declined to recognize similar due process rights of an elementary or secondary public school teacher who has been dismissed or not re-employed.[6] On the other hand, the Supreme Court has emphasized the importance of vigilant protection of constitutional freedoms in the academic community.[7] "Moreover, in the case of teachers, the government's interest goes beyond the promotion of fairness to the encouragement of an academic atmosphere free from the threat of arbitrary treatment."[8]

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[4] *Willner* v. *Committee on Character & Fitness* (1963), 373 U.S. 96, 103, footnote 2, 10 LEd2d 224.

[5] *Birnbaum* v. *Trussell* (2d Cir., 1966), 371 F2d 672, physician employed at a municipal hospital; *Meredith* v. *Allen County War Memorial Hospital Com'n* (6th Cir., 1968), 397 F2d 33, physician on staff of county hospital; *Lucia* v. *Duggan* (D.Mass., 1969), 303 FSupp. 112, public school teacher; *Orr* v. *Trinter* (S.D.Ohio, August 3, 1970), public school teacher. See also, the dissenting opinion of Judge Lay in *Freeman*, supra n. 1, pages 1161, 1164.

[6] *Jones*, *Freeman*, *Henry*, and *Hopkins*, supra, fn. 1. The Court has, however, recently granted certiorari in a case in this field: *Sindermann* v. *Perry* (5th Cir., 1970) 430 F2d 939, cert. granted June 14, 1971, 39 L.W. 3548.

[7] *Shelton* v. *Tucker* (1960), 364 U.S. 479, 487, quoting from *Weiman* v. *Updegraff* (1952), 344 U.S. 183, 195, and *Sweezy* v. *New Hampshire* (1957), 354 U.S. 234, 250.

[8] Developments-Academic Freedom (1968), 81 Harvard Law Rev. 1045, 1082.

The instant case arose after serious disturbance on that particular campus, and public expressions by plaintiff of his opinions, critical of the administrators. It appeared, after discovery in this action, that these expressions were considered by defendants, albeit in a context of supposed relevancy to his performance of his duties. Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights.[9]

The judgment appealed from is affirmed.[10] Necessarily our affirmance does not deprive the district court of power to modify the judgment so as make adjustments for the passage of time or circumstances which have arisen since its entry.

DUFFY, *Senior Circuit Judge,* dissenting.

I respectfully dissent. I agree with the statement in one of the amicus curiae briefs submitted in this case that "Affirmance of the judgment below . . . will constitute an unprecedented and unwise incursion of the federal courts into the domain of public higher education." [1] In holding that under the Wisconsin statutory provision which permits the

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[9] See Van Alstyne, Right-Privilege Distinction (1968), 81 Harvard Law Rev. 1439, 1453.

[10] Since this opinion adopts a position concerning which a conflict appears to exist between the circuits, the majority and dissenting opinions have been circulated, before filing, to all the judges of this court in regular active service. The proposition that the appeal be reheard en banc failed to receive the support of a majority, four voting in favor and four opposed.

[1] Brief of the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, the Board of Trustees of Southern Illinois University, the American Association of State Colleges and Universities, The American Council on Education and the Association of American Colleges, p. 3.

contracts of probationary instructors to expire at the "pleasure" of the university, it must now include a statement of reasons and the opportunity for a hearing, the majority calls into question a practice that is well established and is customary at more than one thousand public schools and universities in this country, which have some three hundred thousand faculty members and over six million students. (Amicus brief, at 2-3). I do not believe that the procedural protections now called for by the majority opinion are required by the Constitution or will they prove to be effective protections in fact.

Plaintiff, David Roth, never had been employed in the state university system before he signed a contract to teach at Wisconsin State University, Oshkosh, for the 1968-69 academic year. This was his first teaching job. The contract was for one year only and it is clear that under the Wisconsin Statutes (Wis. Stats. Sec. 37.31(1)) the contract carried with it no further express or implied promise of continued employment. Moreover, the statute did not provide for a statement of reasons or a hearing in the event that the contract of a probationary instructor such as Roth was not renewed for the following year. This is to be contrasted with the situation of a tenured faculty member who could only be dismissed "for cause," which includes, by definition, certain procedural protections such as the right to a statement of reasons and a hearing.

The tenure system in effect at Wisconsin State University-Oshkosh is typical of college tenure system throughout the United States. In Wisconsin, the tenure system for colleges and universities is adopted by statute. (Wis. Stats. Sec. 37.31(1)). A decision not to grant tenure ordinarily is embodied in a notice of contract non-renewal.

Consistent with customary procedure at the University, the decision not to rehire plaintiff Roth was made by President Guiles alone. However, the President then had before him the recommendation of the Tenure Committee of the

Department of Political Science, the Dean of the School of Letters and Science and the Vice President for Academic Affairs. All of these recommended that plaintiff not be re-employed.

The Board of Regents can reverse a decision of the President of the University. However, Roth did not appeal to the Board. Instead, he filed the complaint in the District Court under 42 U.S.C. § 1983 from which this appeal is taken. His stated reason for this course of action was that the Federal Court "is the only entity to be trusted for a fair hearing." [2]

Roth's complaint alleged first, that he was entitled to a statement of reasons and a hearing on the question of his non-renewal, and secondly, that the reason his contract was not renewed stemmed from his choosing to exercise his rights guaranteed by the Constitution.

However, as indicated in the majority opinion, this second and "substantive" ground for relief was kept separate from the procedural argument now before us. The District Judge granted partial summary judgment in favor of plaintiff solely on the ground that, as a matter of procedural due process, the defendants must give plaintiff a written statement of the reasons on which they relied in deciding not to reemploy him, and to offer him a hearing within a specified time at which he could reply to the stated reasons, or, in the alternative, that defendants offer plaintiff a contract for the up-coming academic year.

I

It is my personal opinion that the decision of the District Court is both unwise and unworkable. What troubles me especially is that the result of the decision might well be to make the Federal Courts the final arbiters of all similar cases. The majority opinion calls for a hearing before a

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[2] Roth deposition, page 27.

state administrative body at which time difficult questions of constitutional law might well be presented. Administrative bodies of this sort are not qualified to pass on such questions. A person who feels he has been unjustly refused a renewal of his teaching contract certainly will not be satisfied with the result of such a hearing, if it be adverse to him. He will, quite naturally, seek relief in the federal courts and, once having reached that forum, will feel free to ignore all the proceedings that have transpired before. Indeed, that appears to have been the attitude of the plaintiff in the case before us as indicated by his statement that the Federal Court was "the only entity to be trusted for a fair hearing."

On the other hand, the state will not be so free to ignore the results of such hearings but will, instead, be required to incur a great expense to provide them in the first place. In undertaking the balancing test of the "precise nature of the government function involved as well as of the private interest that has been affected by governmental action" called for in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 at 895, I do not think that either the District Judge or the majority here placed sufficient weight on the burden to be borne by the State in providing these hearings. We may note that as a result of very rapid growth, the faculties of most colleges and universities contain a high percentage of young and untested teachers. Moreover, it also has been pointed out to us that the seller's market in teaching talent has changed to a buyer's market, and that we may well expect that universities will take this opportunity to upgrade their younger faculties by extensive substitutions as better qualified applicants become plentiful. The result, obviously, will be that a much greater number of non-tenured teachers will be notified that their contracts have not been renewed than has been true in the past. As illustration of the fact that this trend already has begun we note, from appellant's brief, that for 1970 alone, 206 non-tenured teachers of the Wisconsin State University system were notified that they would

not be retained. Clearly, it will be a significant burden for the State to hold hearings on the difficult questions involved in non-renewal decisions even if not all of those teachers demand that a hearing be held.

I further feel that the procedures ordered by the District Court and approved of by the majority here will be almost impossible to administer and certainly will not render any easier the task of federal courts in their assessment of whether or not any substantive constitutional freedoms have been impinged. Decisions over whether or not to rehire a probationary instructor are exceedingly difficult to make; are based on various combinations of personal judgments, and are no easier to review. Under the majority's holding, administrative bodies will be compelled to review these personal judgments while possessing no expertise in the ultimate constitutional claims at issue. We shall then be called upon to conduct a second review of a, no doubt, already confusing set of facts. Our task may end up being both unmanageable and futile.[3]

The majority opinion states that the hearing is called for in part as a "prophylactic" against infringement of constitutional freedoms, yet it is difficult to see how such proceedings will assist the process in any appreciable manner. If, in fact, certain educational bodies may sometimes act out of ill will in rendering non-renewal decisions (a proposition which I do not so readily accept), they clearly will not be deterred by any procedures approved of by this Court.

The tenure system, which has been carefully worked out throughout the years, has, at its root, the requirement that a tenured professor can only be dismissed for "cause." The

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[3] On the difficulty in assessing rehiring decisions see: F. Machlup "On Some Misconceptions Concerning Academic Freedom" in *Academic Freedom and Tenure,* at pp. 185-6. On the problems of judicial review of school cases in general see Judge Lay's dissent in *Esteban* v. *Central Missouri State College,* 415 F2d 1077 (8 Cir., 1969).

assessment of whether, in fact, cause exists has traditionally included the affording of certain procedural safeguards, such as those now before us. On the other hand, non-tenured personnel has traditionally not been accorded these same protections, and they have known that this was so when they took their jobs. The majority opinion purports not to disturb that carefully worked out distinction, yet, in my view, such will be the end result.

II

Aside from my own personal views on the matter, I wish to point out that the majority opinion goes far beyond the present state of the law and, in fact, now places this Circuit in direct conflict with two other Circuits in this area of the law. Of course, I recognize that a university may not, consistent with the Constitution, take retaliatory action against one of its employees just because that employee has chosen to exercise his rights guaranteed to him by the Constitution. *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), and *McLaughlin* v. *Tilendis,* 398 F.2d 287 (7 Cir., 1969). But that is not what is involved here. We deal instead with what procedures must be followed by a university when indicating to a probationary instructor that he will not be rehired for the following year.

Procedural due process is a totally separate area from the protection of substantive constitutional rights and, as the Supreme Court has indicated—"The Fifth Amendment does not require a trial-type hearing in every conceivable case of governmental impairment of private interest." *Cafeteria Workers* v. *McElroy, supra,* at 895. But even acknowledging that the flexible standard of procedural due process may sometimes require the affording of a hearing and other minimal protections when life and liberty are at stake, *Goldberg* v. *Kelly,* 397 U.S. 254, *Hahn* v. *Burke,*

430 F.2d 100 (7 Cir., 1970), cert. den. 39 Law Week, 3473 (April 21, 1971), that does not mean that the majority's result is required. For, as I read the majority opinion, it now becomes the first opinion to require that these procedures be mandated to a probationary instructor whose contract is not renewed yet, who admittedly, has made no further substantive allegation of infringement of constitutional freedoms.

It is clear that nothing in any of the Supreme Court decisions compels the majority's result here. If anything, the Court has assumed the constitutionality of the tenure process, and its corollary, the dismissal of non-tenured faculty members without notice, hearing or statement of reasons even as the Court, at the same time, has been vigilant to protect substantive constitutional freedoms. This was exactly the case in *Shelton, supra,* where the Court struck down an Arkansas statute which impinged on teachers' freedom of association. Yet, in so doing, the Court noted by contrast that "such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain." (P. 486). While the infringement on the freedom of association was condemned, the validity of the very procedures before us now was assumed.

The validity of the procedures before us now was directly challenged in two other Circuit Court cases. Yet, in each case, the dismissal or non-renewal of a probationary instructor's contract, without a statement of reasons or without a hearing, was held to pass the scrutiny of the due process clause, and in each case, the Supreme Court denied certiorari. *Jones* v. *Hopper,* 410 F.2d 1323 (10 Cir., 1969) cert. den. 397 U.S. 991 (1970); *Freeman* v. *Gould Special School District,* 405 F.2d 1153 (8 Cir., 1969), cert. den.

396 U.S. 843 (Justice, then Judge Blackmun, a concurring member of the panel). In response to the same procedural due process argument as advanced here, the Freeman Court stated: "if this were so [if the argument were accepted] we would have little need of tenure or merit laws as there could only be, as argued by the plaintiffs, a discharge for cause, with the school board carrying the burden of showing that the discharge was for a permissible reason." (at p. 1160). Yet, the majority here rejects the *Freeman* and *Jones* holdings, calls into question the validity of the tenure system, and places this Circuit squarely in conflict with the Eighth and Tenth Circuits.

I wish to emphasize that the majority opinion now requires that universities comply with the procedures established by the District Court order, even when there is absolutely no indication of any infringement of the constitutional rights of the teacher in question. In so doing, the majority opinion becomes unique into itself. I realize that there have been those decisions which have called for a hearing or similar procedures in school cases, but these have arisen only when there has been an allegation of serious infringement of other constitutional rights. *Ferguson* v. *Thomas*, 430 F.2d 852 (5 Cir., 1970); *Lucas* v. *Chapman*, 430 F.2d 945 (5 Cir., 1970); *Hopkins* v. *Wasson*, 227 F. Supp. 278, aff'd. 329 F.2d 67 (6 Cir., 1964), cf. *Meredith* v. *Allen County War Mem. Hosp. Comm'n.*, 397 F.2d 33 (6 Cir., 1968). In each of those decisions, the allegation of an infringement of substantive constitutional rights was recognized as critical by the Court before a hearing would be held to be required. Indeed, the *Lucas* Court took pains to point out its holding "should not be misunderstood", that the hearing was required only when "the asserted reason for termination involved a possible collision with . . . First Amendment rights." (at p. 947). As mentioned before, I have grave doubts as to the practical workability of such a distinction, but even conceding that, it should be noted

that the majority now goes beyond those cases to hold that a university must "shoulder the burden" in *all* cases, even in those situations where there is no allegation of infringement of First Amendment rights.

That such is the majority's holding is indicated at the outset of its opinion, further, in the statement on page 5 that the holding "applies by its terms to all non-retention decisions", and from an examination of the proceedings in the District Court. (310 F. Supp. at 982-3). If plaintiff Roth did have a *bona fide* claim of infringement of his First Amendment rights, he deliberately has held that claim in abeyance in another "branch" of the case in order to establish, as a matter of law, the requirement of the procedural protections before us now. I think that this Court's acceptance of that format for argument has resulted in the unnecessary decision of a constitutional question which has been doubly unfortunate in that it has resulted in this Circuit going far beyond any other case in this area. It is puzzling that the Court has been willing to do this for in one of the very cases cited as support by the majority, we indicated our preference to decide only those constitutional issues necessary to resolve the controversy. In *Kiiskila* v. *Nichols,* 433 F.2d 745, en banc (1970), this Court held that a civilian employee had been improperly excluded from a military reservation because of her expression of anti-war views. In that case, the requirement that a hearing be given was urged upon this Court. Even though the Court expressed some doubt as to whether the employee could be so excluded without the opportunity for a hearing (p. 747, n. 2) we deliberately stated that we "need not decide" that question because the case could be resolved otherwise. I think that such a practice should have been followed by the District Judge in the case at bar with, perhaps, the consequence that such a wide reaching and unsettling result would not have been reached.

In my view, the State's interest in preserving a workable

system of tenure which includes, almost by definition, the ability to select freely and maturely its non-tenured teaching personnel, far outweights any expectancy which the plaintiff David Roth might have had in continued employment at Wisconsin State University.[4] I believe that the teaching of *Cafeteria Workers* v. *McElroy, supra,* supports this view especially when the great burden this Court's holding will present for states is considered. I further believe that the majority's holding is both unprecedented and represents an unwarranted intrusion of the Federal Judiciary into state educational systems. It is one thing to recognize that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (*Shelton,* at page 487), and that "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker* v. *Des Moines County School Dist.*), 393 U.S. 503 (1969) but it is quite another to hold that anxiety over hypothetical infringements of unknown constitutional freedoms demands that states accord the full panoply of procedural due process guarantees for those teachers whose services they designate as no longer required.

We should follow the decision in *Freeman* v. *Gould Special School District, supra,* where the Court held that

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[4] It is interesting to note that Roth signed his one year teaching contract presumably with full knowledge of the Wisconsin Statute (Wis. Stat. Ann. Sec. 37.31) which does not provide for a hearing or statement of reasons in the event that his contract was not renewed. On the other hand, in *Birnbaum* v. *Trussell,* 371 F.2d 672, relied upon heavily by the majority, it appears that there was some pre-existing state requirement that a hearing be provided for physicians who were to be discharged. While this factor by itself cannot, of course, be determinative, due to the Supremacy Clause, it is clear that Roth's "expectancy" in continued employment and in the procedures to be followed in terminating that employment differed sharply from that of Dr. Birnbaum. On other distinctions between the expectancies of teachers as opposed to physicians, see *Freeman, supra,* at 1160.

"Probationary instructors whose contracts were not renewed, were not entitled to a hearing with notice."

I respectfully dissent.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.